AAPA American Association of Port Authorities
Alliance of the Ports of Canada, the Caribbean, Latin America and the United States

Seaports Deliver Prosperity

August 6, 2015

Via email E-mail: secretary@fmc.gov.

Karen V. Gregory
Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573-0001

Re: Docket No. 15-06, Comments on Proposed Attorney Fee and Term Limit Regulations.

Dear Ms. Gregory:

Pursuant to the Commission's *Notice of Proposed Rulemaking* issued July 1, 2015 and published at 80 Fed. Reg. 38153, the American Association of Port Authorities (AAPA) hereby submits comments on behalf of its U.S. port members on the Commission's proposal to amend its regulations governing the award of attorneys fees in Shipping Act complaint proceedings. The amendments are necessary to conform the Commission's regulations to the statutory revisions enacted in Section 402 of the Howard Coble Coast Guard and Maritime Transportation Act of 2014, Public Law 113–281. AAPA addresses two issues in these comments that are of general interest to its U.S. port members: the standard for determining who is a prevailing party eligible to recover attorneys fees, and the standard for exercising discretion to determine whether to award attorneys fees to an eligible party.

The Coble Act made two significant changes to prior law. First, rather than authorizing a fee award only to a prevailing reparations *complainant*, the Act now authorizes an award to a prevailing *party*, thus eliminating the asymmetry of the prior provision that required an award to a complainant but did not allow one to a respondent. Second, rather than making a fee award mandatory as in the prior law ("shall direct"), the award is now discretionary (fees "may be awarded"). *See* 80 Fed. Reg. at 38154.

It is essential that the Commission's implementation of the legislation recognize the legislation's purpose to create symmetry. The Commission should thus answer the key question in its rulemaking by adopting a model along the lines of the Copyright Act rather than the civil rights laws in awarding attorneys fees under the Shipping Act. A symmetrical standard is also dictated by the Shipping Act's role as a non-discriminatory regulatory statute, rather than a remedial statute. Fee awards will necessarily be decided on the basis of the facts presented by particular cases, but the Commission can and should

make clear in this rulemaking that those awards will be based on a symmetrical standard that allows fee-shifting awards only where circumstances are present that justify a departure from the rule generally applicable in U.S. law that each party is expected to bear its own attorneys fees.

AAPA's interest

AAPA initiated this change in the attorneys fee provision of the Shipping Act because its members believe that the prior one-sided provision was artificially encouraging actions against ports by large well financed private parties attempting to improve their bargaining position in commercial negotiations with public port authorities by filing Shipping Act claims against them. While port authorities have prevailed in these suits, they have proven expensive to defend and have diverted ports' attention and resources away from their primary goal of encouraging the development and free flow of U.S. waterborne commerce. Moreover, the fear of a large fee award can coerce ports into settling cases even if they have meritorious defences.

An attorneys fees provision that awards fees only to complainants operates to encourage suits that otherwise would not be brought; that is the avowed purpose of such provisions. In eliminating the one-sided provision of the prior law, Congress acted to alter this incentive. Should the Commission adopt a standard based on the civil rights laws, which routinely awards fees to complainants while respondents receive them only in the most exceptional cases, Congress' action in eliminating a one-sided standard would be vitiated. It is not plausible to believe, and it would not be reasonable for the Commission to conclude, that Congress would have gone to the trouble to amend the statute so that parties could wind up almost exactly where they were before the amendment.

The standard for determining eligibility to recover attorneys fees (prevailing party)

The Commission proposes to rely on relevant federal case law to the extent practicable in determining whether a party has "prevailed" in a particular complaint proceeding and is thus eligible to recover attorneys fees under the new fee-shifting provision. *See* 80 Fed. Reg. at 38155-56. AAPA believes that this is a reasonable approach.

In particular, the Commission should clarify, in accordance with federal case law precedent, that a plaintiff must obtain some enforceable relief in order to qualify for a fee award. *See, e.g., Farrar v. Hobby*, 506 U.S. 103 (1992). A plaintiff who obtains an empty judgment is, for example, not a prevailing party. *See Tunison v. Continental Airlines*, Inc., 162 F.2d 1187, 1190 (D.C. Cir. 1998). To the extent the Commission might consider the statute to allow an award of fees where nonmonetary relief is awarded (a matter Congress did not explicitly address and which has rarely if ever if ever come up in private complaint actions), it would be required that an underlying Commission order mandate "some action (or cessation of action) by the defendant," *Hewitt v. Helms*, 482 U.S. 755, 761 (1987), and "materially alter the legal relationship between the parties." *Lefemine v. Wideman*, 133 S. Ct. 9, 11 (2012) (per curiam). A party is not eligible for fees based on the claim that its suit acted as "catalyst" to prompt the respondent to change

its behavior voluntarily; rather there must be a "judicially sanctioned change in the legal relationship of the parties." *Buckhannon Board and Care Home, Incorporated v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 605 (2001).

AAPA believes these standards are sound and consistent with the purposes of the legislation.

The standard for exercising discretion to determine whether to award attorneys fees to an eligible party

General Principles

"Our legal system generally requires each party to bear his own litigation expenses." *Fox v. Vice*, 131 S. Ct. 2205, 2213 (2011). The rule is so engrained in U.S. law it is commonly known as the "American Rule." *Id.* (citing *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U. S. 240, 247 (1975)). Deviations from the American Rule thus do, and should, require significant justification. As noted above, that justification has not been present for Shipping Act claims against ports, leading the AAPA to seek and Congress to enact the legislation at issue in this rulemaking.

The Commission's *Notice* identifies two prevalent standards used by the federal courts in determining fee entitlement under statutory provisions that allow for, but do not require, the award of attorneys fees to the prevailing party in an action: (1) the standard used in applying the fee-shifting provision in the Copyright Act, 17 U.S.C. 505, and (2) the standard used in determining entitlement to attorneys fees under civil rights laws. *See* 42 U.S.C. §§ 1988, 2000a-3(b), 2000e-5(k). AAPA supports use of the Copyright Act standard and submits that the civil rights laws do not provide a proper analogy in any respect.

The standard applied under the civil rights laws is not appropriate under the Shipping Act

Fee shifting under civil rights statutes is generally asymmetric: fees are awarded to prevailing plaintiffs as a matter of course, but prevailing defendants recover only when forced to litigate claims that are frivolous, unreasonable, or pursued in bad faith. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968) (per curiam) (standard for plaintiffs); *Christiansburg Garment Co. v. EEOC*, 434 U. S. 412, 416 (1978)(standard for defendants). This standard is squarely inconsistent with the legislation, which eliminates the prior asymmetry under which successful reparations complainants receive fees but successful respondents do not. As noted above, it is not reasonable to suppose that Congress went to the trouble of eliminating the asymmetry by amending the statute just to have the Commission reinstate it as a matter of discretion.

The purposes of civil rights fee shifting are inconsistent with the purposes of the Shipping Act and with the actual experience of private litigation under the Act. Fee shifting under the civil rights laws is thought necessary because those actions are often brought by

individuals who lack sufficient resources to hire attorneys to pursue claims against defendants with much larger resources, and because many of the statutes that Congress wanted to have enforced through private claims often generate small recoveries or none at all, even as to claims that are of significant merit and social importance. These purposes have been well summarized as follows:

> Congress' purpose in adopting fee-shifting provisions was to strengthen the enforcement of selected federal laws by ensuring that private persons seeking to enforce those laws could retain competent counsel. *See* S. Rep. No. 94-1011, p. 6 (1976). In particular, federal fee-shifting provisions have been designed to address two related difficulties that otherwise would prevent private persons from obtaining counsel. First, many potential plaintiffs lack sufficient resources to hire attorneys. *See* H. R. Rep. No. 94-1558, p. 1 (1976); S. Rep. No. 94-1011, at 2. Second, many of the statutes to which Congress attached fee-shifting provisions typically will generate either no damages or only small recoveries; accordingly, plaintiffs bringing cases under these statutes cannot offer attorneys a share of a recovery sufficient to justify a standard contingent-fee arrangement. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley II*), 483 U. S. 711, 749 (1987) (dissenting opinion); H. R. Rep. No. 94-1558, at 9. The strategy of the fee-shifting provisions is to attract competent counsel to selected federal cases by ensuring that if they prevail, counsel will receive fees commensurable with what they could obtain in other litigation.

City of Burlington v. Dague, 505 U.S. 557, 568 (1992)(Blackmun, J. dissenting)

Newman v Piggie Park was a suit brought by African-Americans denied service at a restaurant due to their race. Such claims are important to vindicate, even if there is no monetary loss to the plaintiff or any loss is very small. For this reason nominal damages of, for example, $1 are often awarded in civil rights cases (and under the *Farrar* case such awards can support an award of fees). Notwithstanding the absence of any significant monetary loss, there has been harm to the dignity of the plaintiff, and the defendant's actions contravene a very strong public policy that warrants vindication.

Shipping Act claims, by contrast, do not lend themselves to awards of "nominal damages" on the basis that complainants suffer dignitary harms. Rights of individual dignity are not at issue in Shipping Act claims. Thus, while parties who have suffered dignitary harms are encouraged by the fee-shifting provisions of the civil rights laws to bring suits even if they have not suffered any substantial monetary loss, there is no reason to encourage Shipping Act claims by parties who do not have a financial incentive in filing the claim. To the contrary, wise policy would counsel *dis*favoring

such claims. And by the same token, where Shipping Act claims do have merit, potential recoveries are high if a legitimate claim is proven, so there is no need for fee-shifting to encourage competent counsel to take meritorious cases. *See, e.g., Seacon Terminals, Inc., v. Port of Seattle,* 26 S.R.R. 248, 271 (I.D. 1992)(claim was for $6.3 million in alleged lost profits), *aff'd*, 26 S.R.R. 886 (FMC 1993). No special departure from the general principle of U.S. law that parties should bear their own fees is warranted on this ground as to Shipping Act claims, and the civil rights laws accordingly provide a very poor model for fee-shifting under the Shipping Act.

Fee shifting under the civil rights laws provides a poor precedent for the Shipping Act based on its second justification as well: that potential plaintiffs lack sufficient resources to hire attorneys. Fee shifting under the antitrust laws has a similar rationale: an imbalance of resources between smaller plaintiffs and large defendants exercising substantial market power. Again that has not been the case in the actions that have been brought against AAPA members under the Shipping Act. These actions have, to the contrary, often been brought by well financed private parties to try to gain leverage in commercial disputes with ports. S*ee e.g., R.O. White and Ceres v. POMTOC and City of Miami*, 31 S.R.R. 783 (FMC 2009)(complainant operated as a wholly owned subsidiary of the NYK Group); *Premier Auto. Servs. v. Flanagan*, 73 Fed. Reg. 34,017, 34,019-20 (FMC June 16, 2008)(complainant owned by a major Hollywood producer); *Maher Terminals v. Port Authority of New York and New Jersey*, FMC No. 08-03 (FMC Dec. 17, 2014), *appeal pending* No. 15-1035 (D.C. Cir.)(complaint filed shortly after complainant was acquired by Deutsche Bank for about $2.3 billion); *Seacon* (complainant was controlled by K-Line).

The civil rights laws simply do not provide a sound model for the exercise of discretion in awarding fees under the Shipping Act.

The Commission should adopt the symmetrical standard applied under the Copyright Act

The alternative standard identified in the *Notice*, the one used to apply the fee-shifting provision in the Copyright Act, is far more suitable. The copyright law standard is in line with Congress' intent and is closer to the default American Rule that presumptively applies under U.S. law.

The key element of the Copyright Act standard warranting its adoption by the Commission is that it requires courts to use the same standard for prevailing plaintiffs and prevailing defendants when making such determinations. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534–35 (1994). This is consistent with the purposes of the recent legislation, and also with the purposes of the Shipping Act. As noted above, a major element of the Coble Act's change to the Shipping Act attorneys fee provision is to replace the current direction that fees be awarded to a prevailing reparations *complainant* with the authorization to make an award to a prevailing *party*. Congress thus replaced an asymmetrical standard with a symmetrical one. Adoption of the standard the Supreme Court has directed under Copyright Act, under which the same

standards apply to awards to both plaintiffs and defendants, thus complies with Congress' intent.

Adoption of a symmetrical standard is also consistent with the purposes of the Shipping Act. The Act is not intended to remedy history of discrimination against individuals because they are members of an historically disfavored and disadvantaged group, as under the civil rights acts, or to remediate environmental harms, as under the environmental statutes that also often include one-sided fee-shifting provisions to encourage plaintiffs to act as "private attorneys general." Rather, the Shipping Act is intended to provide a **"non-discriminatory** regulatory process." 46 U.S.C § 40101(1)(emphasis added). Neither this purpose nor any of the Act's other purposes are served by a rule that favors complainants over respondents as to attorneys fees awards. To the contrary, a non-discriminatory regulatory system is best served by a nondiscriminatory standard for awarding fees.

AAPA also believes that the specific factors listed in the *Fogerty* case, namely "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence," are useful guideposts for the exercise of discretion. 510 U.S. at 535 n.19 (quoting *Lieb v. Topstone Industries, Inc.*, 788 F.2d 151, 156 (3rd Cir. 1986)). These are factors that the Commission's administrative law judges will have to apply in the first instance. However, the Commission should clarify that awards under these factors should be the exception and not the rule. For example, fee-shifting under the Copyright Act, like that under the civil rights acts, has as one of its justifications that many copyright violations do not lead to significant or easily provable damages, and that fee awards are thus necessary to provide sufficient deterrence of violations. *See, e.g., Magnuson v Video Yesteryear*, 85 F.3d 1424, 1432 (9th Cir. 1996) (awarding fees where damages award of $375 was "insufficient to deter future copyright infringement"); *Gonzalez v. Transfer Technologies, Inc.*, 301 F.3d 601, 609-10 (7th Cir. 2002)(same where damages were the statutory minimum of $3000, noting that wilful infringements involving small amounts of money cannot be deterred without fees). As pointed out above, this factor generally does not apply to Shipping Act claims. The rulemaking should thus caution that fee-shifting, as a departure from the general rule that each side bears its own fees, should thus be imposed only upon specific findings that the particular facts of the case warrant an award of fees notwithstanding the general American Rule to the contrary.

Adoption of a framework

The Commission's *Notice* asks whether it should "decline to adopt any framework as part of this rulemaking and, instead, address all entitlement issues through the formal adjudication process." *See* 80 Fed. Reg. at 38156. As noted above, it is vital that the Commission in this rulemaking give broad direction on two matters. First, the Commission should make clear that the standards for awards should be the same for both plaintiffs and defendants, thus applying a symmetrical rule as in the *Fogerty* case. This will preserve necessary discretion as to the factors justifying an award in any given

case, but will also provide necessary guidance to the regulated community, and in particular make clear that the one-sided fee-shafting regime that encouraged costly yet ultimately meritless suits, especially in the port context, no longer applies. That guidance will be, at best, significantly delayed if the Commission awaits specific adjudicatory proceedings to articulate the principle. Second, the Commission should make clear that fee awards are the exception and not the rule, and must be justified by particular factors in each case justifying departure from the usual rule that fees are paid by the party incurring them.

As also noted above, entitlement to fees in any given case will depend on the specific facts and circumstances of that case. And while the *Fogerty/Lieb* factors are useful guideposts to the exercise of discretion, it would seem impracticable for the Commission to identify *a priori* each factor that might prove relevant to a case in the future, or that might prove necessary to fulfil the purposes of the Act. Again, such considerations can be taken into account in specific circumstances, but do not seem to lend themselves to a strict and comprehensive codification in regulatory language.

We appreciate the Commission's consideration of these comments.

Very truly yours,

Jean C. Godwin
Executive Vice President and General Counsel
American Association of Port Authorities
1010 Duke Street
Alexandria, VA 22314
(703) 684-5700

cc: Thomas G. Schroeter
Associate General Counsel
Port of Houston Authority
Chairman, AAPA Law Review Committee

Tom Tanaka
Senior Port Counsel
Port of Seattle
Working Group Chairman

John Longstreth
Partner
K&L Gates LLP